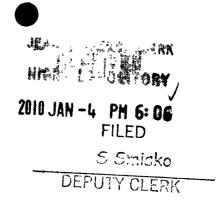
Office of the Yavapai County Attorney 255 E. Gurley Street, Suite 300 Prescott, AZ 86301 Phone: (928) 771-3344 Facsimile: (928) 771-3110 YAVAPAI COUNTY ATTORNEY'S OFFICE JOSEPH C. BUTNER SBN 005229 DEPUTY COUNTY ATTORNEY 255 East Gurley Street Prescott, AZ 86301 Telephone: 928-771-3344 ycao@co.yavapai.az.us



IN THE SUPERIOR COURT OF STATE OF ARIZONA IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,	Cause No. P1300CR20081339
Plaintiff,	Division 6
v.	STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR IN THE
STEVEN CARROLL DEMOCKER,	ALTERNATIVE FOR A WILLITS INSTRUCTION
Defendant.	

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Dismiss or in the Alternative for a Willits Instruction, with respect to the bicycle and shoe print impressions and requests that the Motion be denied. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Dismissal with prejudice is not warranted.

Absent bad faith on the part of the State, failure to preserve evidence that is possibly exculpatory does not deprive a defendant of due process. *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993). As Defendant has failed to show that the State has in any way acted in bad faith, his request for dismissal with prejudice should be rejected.

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II. To merit a Willits instruction, Defendant must show 1) that the State failed to preserve material and reasonably accessible evidence having a tendency to exonerate him <u>and</u> 2) that the failure resulted in prejudice.

Defendant claims that Yavapai County Sheriff's Office's (YCSO) failure to follow Arizona Department of Safety (DPS) protocols designed for the Scientific Analysis Bureau of the DPS Crime Lab entitles them to either dismissal of the charges with prejudice or a Willits¹ instruction regarding the bicycle tire and shoe print impressions. This argument must fail. The proposition that one law enforcement agency must follow the protocols of a wholly separate law enforcement agency in order avoid dismissal with prejudice or a Willits instruction is not supported by Arizona law.

"In order to be entitled to a *Willits* instruction, a defendant must prove (1) that the state failed to preserve material evidence that was assessable and which might tend to exonerate him *and* (2) that the failure resulted in prejudice to the defendant." *State v. Dunlap*, 187 Ariz. 441, 463, 930 P.2d 518, 540 (App. 1996) (emphasis added); *see also State v. Speer*, 221 Ariz. 449, 457, 212 P.3d 787, 795 (2009); *State v. Murray*, 184 Ariz. 9, 33 906 P.2d 542, 566 (1995); *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985); *State v. Perez*, 141 Ariz. 459, 687 P.2d 1214 (1984).

Here, YCSO personnel located both bicycle tire and shoe impressions on the ranch land directly adjacent to Carol Kennedy's property and the same shoe impressions close to the exterior door of the room where Carol was murdered. Dozens of photographs of the area and the impressions were taken. Several maps which depict the path made by the bicycle tire and shoe impression have been created. The State disclosed copies of all of the maps, photographs and corresponding reports to the defense. The State has been unable to locate a

^{1.} State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964).

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pair of shoes in Defendant's possession which match the shoe impressions. The bicycle tire impressions are similar to those made by the tires on the bicycle Defendant claimed he was riding at the time of Carol's murder.

The State concedes the pictures could be of better quality; however, the State has not "failed to preserve material evidence" and, more importantly, the quality of the State's evidence is not the main consideration for a *Willits* instruction.

Indeed, in almost every case prosecuted, the claim can be made that the investigation could have been better. We do not believe that failure to pursue every lead or gather every conceivable bit of physical evidence will require a *Willits* instruction. Whether such an instruction is necessary depends on a judgment as to how central the issue is to the case and how much better or more important the "missing" evidence might have been that the evidence that was introduced.

State v. Willcoxson, 156 Ariz. 343, 346-47, 751 P.2d 1385, 1388-89 (App. 1987).

The methodology used while taking the photographs is not central to this case because the existing photographs, regardless of their quality or lack thereof, fail to demonstrate any of the shoes seized from Defendant match the impressions. Better quality photographs would not change this fact. Clearly, Defendant has failed to show the State failed to preserve evidence that would tend to exonerate him. Absent this showing, he cannot demonstrate prejudice.

Regarding the bicycle tire impressions, the State's best evidence is that these are "similar" to those made by the tires on Defendant's bicycle. Obviously, Defendant has benefited from any errors that may have been made during the investigation; therefore, there is no prejudice.

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Office of the Yavapai County Attorney

Prescott, AZ 86301

CONCLUSION:

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Whereas Defendant has failed to show the State failed to preserve material evidence or that, as a result, he suffered prejudice, his Motion to Dismiss or In the Alternative for a *Willits* Instruction should be denied.

RESPECTFULLY SUBMITTED this _____ January, 2010.

Sheila Suffivan Polk
YAVAPAI COUNTY ATTORNEY

Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this <u>Utw</u> day of January, 2010 to:

Honorable Thomas J. Lindberg

Division 6

Yavapai County Superior Court

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